Supreme Court, U.S.
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No. 98-___

In The

Supreme Court of the United States

October Term 1998

STATE OF KANSAS,

Petitioner,

v.

ANN BRANDAU,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's opinion in *Farrar v. Hobby*, 506 U.S. 103 (1992), establish a presumption that no statutory attorney's fee award should be made when the sole relief a plaintiff obtains is a nominal damage award – as several Circuits have recognized, or, are fee awards presumptively permissible even in nominal damage cases, as the Tenth Circuit repeatedly has held?

2. After *Farrar v. Hobby*, what factors guide the fee determination in nominal damages cases?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit upholding an award of more than $40,000 in attorney's fees in this Title VII case in which the jury awarded the plaintiff nominal damages of $1.00 is reported, 168 F.3d 1179 (1999), and is included as Appendix A. The opinion of the United States District Court for the District of Kansas is unpublished and is included as Appendix B.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision on February 16, 1999, and this petition has been filed within ninety days of that date, as required by Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The attorney's fee provision at issue in this case, 42 U.S.C. § 2000e-5(k), provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. . . .

STATEMENT

Procedural History

Respondent Ann Brandau, a former employee of the State of Kansas, sued the State of Kansas and other defendants under Title VII, 42 U.S.C. § 2000e. Ultimately, the case was tried and went to a jury on three claims, with the State of Kansas as the sole defendant: (1) hostile work environment; (2) retaliation; and (3) constructive discharge. Respondent sought twenty-one months of backpay and $50,000 in compensatory damages. The jury rejected respondent's retaliation and constructive discharge claims, and awarded her nominal damages of $1.00 on her hostile work environment claim.

The District Court then awarded respondent attorney's fees in excess of $40,000. The Tenth Circuit, in a 2-1 decision, affirmed.

Statement of Facts

1. *The Facts.*

From August, 1993, through September 29, 1995, respondent Ann Brandau worked as a Court Services Administrative Officer for the 29th Judicial District of Kansas. *See* Appendix of the State of Kansas in the Tenth Circuit ("Tenth Cir. App."), at 3. Respondent alleged in her complaint that the Administrator of Adult Court Services, John Duma, began sexually harassing her about May 4, 1995, by, for example, making lewd comments, attempting to kiss respondent, and telling her that he loved her. *Id.* at 3-4. She further alleged that she

complained to the administrative judge – who had supervisory authority over Duma – on May 22, 1995, and that on June 8, 1995, Duma apologized for his conduct, after the administrative judge had admonished him. *Id.* at 4. On September 29, 1995, respondent resigned her position. *Id.* at 5.

2. *The District Court.*

On September 25, 1996, respondent sued the State of Kansas and two other entity defendants under Title VII, 42 U.S.C. § 2000e. Ultimately, the case was tried and went to a jury on three claims, with the State of Kansas as the sole defendant: (1) hostile work environment; (2) retaliation; and (3) constructive discharge. Respondent sought twenty-one months of back-pay and $50,000 in compensatory damages. The jury rejected respondent's retaliation and constructive discharge claims, Tenth Cir. App. 26-27, and awarded her nominal damages of $1.00 on her hostile work environment claim. *Id.* at 26.

Respondent then moved for an award of attorney's fees under 42 U.S.C. § 2000e-5(k), alleging that she was a "prevailing party" under the statute. The State of Kansas opposed the request, pointing out that even though respondent was technically a prevailing party in light of this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), the "reasonable" fee for a $1.00 nominal damage award on one out of three claims against a single defendant, with no other relief and no greater significance to the case, was "zero." The State did not contest the hours claimed or the hourly rate respondent's attorneys sought, but rather the propriety of any award at all.

The District Court nonetheless awarded respondent more than $40,000 in attorney's fees. The court first noted that respondent succeeded on only one of three claims, but pointed out that *Farrar* holds that a plaintiff who wins only nominal damages is a "prevailing party." Appendix to Petition for a Writ of *Certiorari* ("Pet. App.") 15a. The District Court then quoted a pre-*Farrar* decision of this Court, *Blanchard v. Bergeron*, 489 U.S. 87 (1989), for the proposition that there is a general presumption that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Pet. App. 15a. The District Court calculated the lodestar amount, and then considered making adjustments in light of respondent's limited success.

In order to decide whether to adjust the lodestar, the court relied on Justice O'Connor's concurring opinion in *Farrar*, in which she suggested courts look to the following three factors in nominal damages/minimal success cases: (1) the difference between the judgment recovered and the recovery sought; (2) the significance of the legal issue on which plaintiff prevailed; and (3) the public purpose of the litigation. Pet. App. 16a. The District Court concluded that the $1.00 verdict in respondent's favor on a single claim "vindicated the violation of her civil rights" and was distinguishable from the facts of *Farrar* where the plaintiff sought $17 million from six defendants. *Id.* The court further opined that respondent "succeeded on her main theory", sexual harassment, even though she lost on her other claims. *Id.* at 17a. Lastly, the court opined that respondent's success served the public purposes of putting the State "on notice that it must educate its employees about sexual harassment in the

workplace" and benefiting present and future state employees by "affirm[ing]" their rights. *Id.* at 17a-18a[1]

3. *The Tenth Circuit.*

A divided panel of the Tenth Circuit affirmed the award of attorney's fees.

a. *The Majority.*

After reciting the procedural history of the case and articulating the standard of review, the majority turned to *Farrar*. After briefly discussing the opinion of the Court in *Farrar*, Pet. App. 3a, the majority focused on Justice O'Connor's concurring opinion, which the Tenth Circuit previously had adopted as establishing a three-part test for determining whether to award fees in nominal damages/minimal success cases. *Id.* at 3a-4a (citing *Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997), as "adopting Justice O'Connor's framework"). As noted previously, the three-part test considers the following factors: (1) the difference between the judgment recovered and the recovery sought; (2) the significance of the legal issue on which plaintiff prevailed; and (3) the public purpose of the litigation.

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[1] To bolster this conclusion, the District Court relied on an off-the-record session that court held with the jurors and counsel following the return of the verdict. According to the District Court, that untranscribed, non-record "session" delivered a "loud and clear message" to the State. Pet. App. 17a n. 3.

Then, relying on Justice White's dissenting opinion in *Farrar*, as the Tenth Circuit had previously in *Phelps v. Hamilton*, the Tenth Circuit majority asserted that *Farrar* "did not undermine the general rule that prevailing parties should recover attorney's fees 'unless special circumstances would render such an award unjust.' " Pet. App. 4a-5a (citing *Phelps* and, like the district court, quoting *Blanchard v. Bergeron*, 489 U.S. 87 (1989)). The Tenth Circuit majority then essentially reiterated the District Court's evaluation of Justice O'Connor's three factors. Pet. App. 5a-7a.

The majority went on, however, to add that it did not "believe that the district court's legal analysis underlying the award was erroneous." Pet. App. 7a. Instead, the majority opined that the Circuit's precedent supported using a liberal application of the three factors. Thus, the majority relied on *Koopman v. Water Dist. No. 1*, 41 F.3d 1417 (10th Cir. 1994), for the proposition that a fee award generally is merited in nominal damages cases because others benefit from having their rights affirmed, even if the case itself results in no change of official policy whatsoever. Pet. App. 7a-8a. Similarly, the majority opined that it is unnecessary that a nominal legal victory be novel or establish a new precedent in order to justify a fee award, citing *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997). Pet. App. 8a.

Thus, the majority asserted that, essentially, any decision that "vindicat[es] rights secured by Title VII" merits an attorney's fee award, irrespective of the lack of success in terms of damages or injunctive relief. Pet. App. 8a. The majority concluded by observing that " '[i]t does not appear to us [that] this is the kind of case *Farrar* was

intended to discourage attorneys from taking.' " Pet. App. 9a (quoting *Koopman*, 41 F.3d at 1421.)

b. *The Dissent.*

The dissenting judge emphasized two points of disagreement with the majority. First, the dissent observed that

> This Court's reliance upon "the general rule that prevailing parties should recover attorney's fees," even where that party achieves nothing more than a moral victory through an award of nominal damages, is wrong. *Farrar* says exactly the opposite: Where a jury awards a prevailing party nominal damages and nothing more, an award of attorney's fees is the exception, not the general rule. By discounting *Farrar*'s controlling principles, the district court clearly "exceeded the bounds of permissible choice," under the circumstances of this case. Because this court's opinion, like the district court's, is contrary to *Farrar*, I dissent.

Pet. App. 10a (Baldock, J., dissenting).[2]

Second, the dissenting judge pointed out that the majority relied entirely "on Justice O'Connor's concurring opinion in *Farrar*, which notably no other member of the Court chose to join." Pet. App. 11a. Even assuming

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[2] The dissenting judge also pointed out that in one recent decision the Tenth Circuit had "incorrectly referred to *Farrar* as a plurality opinion." Pet. App. 10a n. 1 (citing *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1078 (10th Cir. 1998)).

the proper test is set out in Justice O'Connor's concurring opinion, the dissenting judge found the majority's application of the three factors unpersuasive. First, noting the majority's reliance on the assertions that the jury's verdict "vindicated the violation of [Brandau's] civil rights" and "served a larger public purpose," the dissent concluded that "[s]uch vague and indeterminate postulations may be made in virtually all civil rights litigation where plaintiff is a prevailing party by virtue of a nominal damage award." *Id.* Contrary to the majority, the dissent concluded that "the sole legal issue on which Plaintiff prevailed was unremarkable" and "the public benefit from the litigation was uncertain at best, negligible at worst." *Id.* Thus, the dissent observed that "[i]f this is not a case in which *Farrar* precludes an award of attorney's fees, I am hard pressed to hypothesize one." *Id.*

The dissent further noted that other circuits, such as the Second Circuit, have taken a view contrary to the Tenth Circuit's position. Pet. App. 11a (citing and quoting *Pino v. Locascio*, 101 F.3d 235 (2d Cir. 1996)). The dissent emphasized that "after today, the general rule in the Tenth Circuit appears to be that a one dollar nominal damage award alone justifies a $40,000 fee award." Pet. App. 11a-12a. The dissent further emphasized that, besides the $1.00 nominal damage award, respondent "obtained *no* meaningful relief – damage award or otherwise." *Id.* at 12a. Thus, even assuming the State's "response to sexual harassment in the workplace was inadequate, the fact remains that the 'enforceable judgment' requires [the State] to do nothing more than pay [respondent] $1.00." *Id.*

The dissent concluded as follows

> The issue in this case is straightforward and before today was easily resolved: Does a district court abuse its discretion in awarding attorney's fees to a civil rights plaintiff who recovers only nominal damages and nothing more? In *Farrar*, the Supreme Court answered the question with a resounding yes. As an inferior court, we must follow its dictates. While *Farrar* did not establish a *per se* rule that a civil rights plaintiff recovering only nominal damages can never receive an attorney's fee award, the Court's opinion clearly indicates that a fee award in such cases will be rare. Plaintiff Brandau's lawsuit is not the rare exception.

Pet. App. 12a-13a (internal citation omitted).

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Interpreting And Applying *Farrar v. Hobby*, 506 U.S. 103 (1992), Raises Two Important, Unsettled Issues Of Law That Have Divided The Circuits

The "American Rule" is that each party in a lawsuit generally bears its own attorney's fees and expenses, irrespective of the outcome of the suit. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Under certain federal statutory schemes, however, such as Title VII and Section 1983, a prevailing plaintiff is authorized to recover a statutory award of attorney's fees and costs. *See, e.g.*, 42 U.S.C. § 2000e-5(k) ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"); 42 U.S.C. § 1988(b) ("the court, in its

discretion, may allow the prevailing party . . . a reasonable attorney's fee").[3] Although the statutory language is phrased in a discretionary manner ("the court, in its discretion, may"), this Court has in the past stated that a prevailing plaintiff generally should be awarded attorney's fees under these statutes. *See Blanchard v. Bergeron*, 489 U.S. 87, 89 n. 1 (1989).[4]

In *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court for the first and only time considered the application of these fee-shifting statutes in a case in which the plaintiff's only success was a nominal damage award. The plaintiff in *Farrar* sued numerous defendants and sought millions of dollars in damages for alleged civil rights violations. After a trial, plaintiff ultimately was awarded $1.00 against a single defendant. The district court then awarded the plaintiff statutory attorney's fees in the amount of $280,000, but the Fifth Circuit reversed, holding that the plaintiff was not a "prevailing party" under 42 U.S.C. § 1988.

This Court affirmed the result, but for a different reason. First, the Court held that "a plaintiff who wins nominal damages is a prevailing party under § 1988." 506 U.S. at 112. But, importantly for this case, the Court went

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[3] This Court has repeatedly stated that, because these federal statutes are worded identically, or virtually so, this Court's cases interpreting language such as the "reasonable" fee requirement are binding precedent with respect to all such federal statutes. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

[4] This Court has, however, recognized an exception when the plaintiff – whether a lawyer or a layperson – has proceeded *pro se*. *See Kay v. Ehrler*, 499 U.S. 432 (1991).

on to discuss the propriety of statutory attorney's fee awards in nominal damages cases. The Court began by pointing out that a statutory fee award must be "reasonable" and that obtaining only nominal relief "does bear on the propriety of fees awarded under § 1988." 506 U.S. at 114. The Court emphasized that "[i]ndeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.' " *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

The Court then affirmed the Fifth Circuit's reversal of the fee award in *Farrar*, observing that

> In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.

506 U.S. at 115. The Court thus concluded that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only *reasonable* fee is *usually* no fee at all." *Id.* (internal citation omitted) (emphasis added).[5]

Justice O'Connor concurred in the Court's judgment, but explained her view that statutory fee awards might

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[5] Contrary to the Tenth Circuit's erroneous understanding in at least one post-*Farrar* decision, *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1078 (10th Cir. 1998) (referring to *Farrar* as a "plurality" opinion), the Court's *Farrar* decision was joined by five Justices, including Justice O'Connor. *See* 506 U.S. at 116 (O'Connor, J., concurring) ("I join the Court's opinion and concur in its judgment").

still, in some cases, be appropriate even though only nominal damages were awarded. *See* 506 U.S. at 116 (O'Connor, J., concurring). Like the Court's opinion which she joined, Justice O'Connor recognized that "when a plaintiff's victory is purely technical or de minimis, a district court need not go through the usual complexities involved in calculating attorney's fees." *Id.* at 117. "Instead, it is enough for a court to explain why the victory is de minimis and announce a sensible decision to 'award low fees or no fees' at all." *Id.* at 118 (citation omitted).

Justice O'Connor recognized that not "all nominal damages awards are de minimis. Nominal relief does not necessarily a nominal victory make." *Id.* at 121. Thus, recognizing that in a particular nominal damages case a fee award might still be proper, she discussed three factors for courts to consider in determining whether the presumption against such an award had been overcome. First, she declared that "a substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical." *Id.* A second factor "is the significance of the legal issue on which the plaintiff claims to have prevailed." *Id.* The third factor is whether the suit at issue "accomplished some public goal other than occupying the time and energy of counsel, court, and client. Section 1988 is not 'a relief Act for lawyers.' " *Id.* at 121-22 (citation omitted). In *Farrar*, Justice O'Connor concluded that consideration of these factors pointed "to a single conclusion" that the appropriate fee was "no fee at all." *Id.* at 122.

A. The Circuits Have Divided On The Important And Recurring Issue Whether *Farrar* Creates A Presumption Against A Statutory Attorney's Fee Award In Nominal Damages Cases

In the seven years since this Court decided *Farrar v. Hobby*, the Circuits have adopted conflicting interpretations of that decision in the considerable number of nominal damages cases that have arisen.[6] The Tenth Circuit, in this case and others, has consistently adhered to "the general rule that prevailing parties should recover attorney's fees" even in nominal damages cases.[7] *See, e.g., Brandau v. State of Kansas*, Pet. App. 4a-5a; *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074 (10th Cir. 1998); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997); *Phelps v. Hamilton*, 120 F.3d 1126 (10th Cir. 1997); *Koopman v. Water Dist. No. 1*, 41 F.3d 1417 (10th Cir. 1994). Some other circuits also have rejected the proposition that *Farrar* creates even a rebuttable presumption against awards of attorney's fees in nominal damages cases. *See, e.g., Piper v. Oliver*, 69 F.3d 875 (8th Cir. 1995) (affirming $8,250 fee award in $1.00 nominal damage case); *id.* at 877 (Loken, J., dissenting) ("this Court joins the District Court in ignoring controlling Supreme Court precedent"); *O'Connor v. Huard*, 117

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[6] A search of "Farrar w/5 Hobby" in the "Allfeds" Westlaw database reveals well over 600 lower federal court decisions that have cited this Court's decision in *Farrar*.

[7] The Tenth Circuit's basis for adopting that rule is a statement in dicta in *Blanchard v. Bergeron*, 489 U.S. 87, 89 n. 1 (1989). *Blanchard*, however, pre-dates this Court's decision in *Farrar* and, in any event, did not involve a nominal damage award nor the attorney's fee questions that arise in such a case.

F.3d 12, 17 (1st Cir. 1997) (*Farrar* does not create a *per se* rule); *Wilcox v. City of Reno*, 42 F.3d 550 (9th Cir. 1994) (affirming $66,000 fee award in $1.00 nominal damage case); *Jones v. Lockhart*, 29 F.3d 422 (8th Cir. 1994) (affirming $10,000 fee award in $1.00 nominal damage case); *Muhammad v. Lockhart*, 104 F.3d 1069 (8th Cir. 1997) (affirming $4,500 fee award in $1.00 nominal damage case).

Other circuits have given effect to this Court's statement in *Farrar* that plaintiffs in nominal damages cases "usually" should receive no fee award at all. For example, the Second Circuit has emphasized that "[t]he vast majority of civil rights litigation does not result in groundbreaking conclusions of law, and therefore will only be appropriate candidates for fee awards if a plaintiff recovers some significant measure of damages or other meaningful relief." *Pino v. Locascio*, 101 F.3d 235, 239 (2d Cir. 1996) (denying fee award). Likewise, in denying a fee award, the Fourth Circuit observed that "*Farrar* was designed to prevent a situation in which a client receives a pyrrhic victory and the lawyers take a pot of gold." *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1339 (4th Cir. 1996). Similarly, the Seventh Circuit has recognized that *Farrar* effectively creates a "rebuttable presumption" that fees should not be awarded in nominal damages cases. *Maul v. Constan*, 23 F.3d 143 (7th Cir. 1994); *id.* at 148 (Flaum, J., dissenting) (opposing denial of fee award in that case, but recognizing that "*Farrar* raises a rebuttable presumption that attorney's fees are inappropriate when a plaintiff recovers only nominal damages").

As the dissenting judge in this case pointed out, the Tenth Circuit's "reliance upon 'the general rule that prevailing parties should recover attorney's fees,' even where that party achieves nothing more than a moral victory through an award of nominal damages, is wrong. *Farrar* says exactly the opposite. . . . " Pet. App. 10a. Nonetheless, the Tenth Circuit consistently and repeatedly has affirmed its adherence to that "general rule," while other Circuits have rejected it. With all due respect, the Tenth Circuit has misread *Farrar* which, while perhaps not establishing a *per se* rule that a nominal damage plaintiff can *never* recover attorney's fees, nonetheless "clearly indicates that a fee award in such a case will be rare." Pet. App. 12a-13a (Baldock, J., dissenting).

The cases cited and discussed above demonstrate that the Circuits are split on the question whether or not *Farrar* creates a presumption against statutory attorney's fee awards in nominal damage cases. The cases also demonstrate that the issue arises with considerable frequency and is of importance, especially to entities such as States that are not infrequently defendants in civil rights litigation. As one Circuit judge observed in a Title VII case that resulted in an attorney's fee dispute:

> In truth, the issues in this case are quite unextraordinary. . . . But, lurking beneath this placid surface is an ever-expanding, ever-growing, ever-devouring two-headed monster: overreaching Title VII litigation and concomitant fee awards. Here, out of a plethora of claims, [the plaintiff] succeeded on only one, recovering little more than the rejected pre-trial settlement offer. And, to add insult to injury, her award is dwarfed by the fee awarded her attorney. * * *

> Obviously, something is amiss. Reason, and reasonableness, have been lost in the shuffle.

Migis v. Pearle Vision, Inc., 135 F.3d 1041, 1049 (5th Cir. 1998) (Barksdale, J., concurring in part, dissenting in part).

Ultimately, it is impossible to reconcile the Tenth Circuit's repeated interpretation that "the general rule [is] that prevailing parties should recover attorney's fees," even in nominal damages cases, Pet. App. 4a-5a, with this Court's statement in *Farrar v. Hobby* that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is *usually* no fee at all." 506 U.S. at 115 (internal citation omitted) (emphasis added).

This case presents an excellent vehicle for deciding the purely legal issue of whether *Farrar v. Hobby* creates a presumption that no fee award should be made in cases where the only relief obtained is a nominal damages award. The question is cleanly raised, preserved, and addressed in the opinions below.

B. The Lower Courts Require Guidance Concerning The Factors Or Test To Apply In Determining The Propriety Of Fee Awards In Nominal Damages Cases

This Court in *Farrar*, perhaps because it believed fee awards in nominal damage cases would be rare, did not articulate any guiding principles for the extremely small number of cases in which a fee award might still be appropriate. Thus, apart from the preceding question,

even the Circuits that have rejected the "presumption" approach have struggled with how to determine the amount of an attorney's fee award in nominal damage cases. The factors or test that should guide such an inquiry, like the "presumption" question, is a pure issue of law that is cleanly raised in this case.

The Tenth Circuit and the District Court in this case relied on three factors that Justice O'Connor discussed in her concurring opinion in *Farrar*: (1) the extent of relief obtained compared to what the plaintiff sought; (2) the significance of the legal issue on which the plaintiff prevailed; and (3) the public purpose the litigation served. 506 U.S. at 121-22. Some other Circuits also have relied upon or adopted these three factors in evaluating fee awards in nominal damage cases. *See, e.g., Johnson v. Lafayette Fire Fighters Ass'n Loc. 472*, 51 F.3d 726, 731 (7th Cir. 1995); *Morales v. City of San Rafael*, 96 F.3d 359, 363 & n. 7 (9th Cir. 1996); *Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997).

These factors, especially the first two, may be an appropriate starting point for inquiring whether the plaintiff can overcome the presumption against awarding fees in a nominal damages case. But the third factor – the public purpose the litigation served – and to a lesser extent the second factor (significance of the legal issue), often have been utilized by lower courts to turn this Court's *Farrar* decision on its head. Unless the courts start from a presumption that a fee award should not be permitted in nominal damages cases, it is relatively easy to conclude that the plaintiff prevailed on a legal issue of some significance (a federal right) and/or that the litigation served a public purpose (vindication of such rights).

For example, like the Tenth Circuit in this case, some Circuits have awarded fees on the sole basis that a nominal damage award served the "public purpose" of vindicating rights and deterring future violations of rights. *See, e.g., O'Connor v. Huard*, 117 F.3d 12, 17 (1st Cir. 1997); *Piper v. Oliver*, 69 F.3d 875, 876-77 (8th Cir. 1995); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1389-92 (9th Cir. 1995); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1583 (11th Cir. 1994). But, as other Circuits and the dissenting judge in this case recognized, that proposition is essentially a truism, established by definition in a federal civil rights case. *See Carter v. Burch*, 34 F.3d 257, 266 (4th Cir. 1994); *Testa v. Village of Mundelein*, 89 F.3d 443, 447 (7th Cir. 1996); *Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996).

Some plaintiffs, apparently trying to address the proportionality notion inherent in Justice O'Connor's first factor, have tried to justify fee awards on the ground that their lawsuits resulted in "relief" beyond a nominal damages award, even though such relief was not judicially ordered or awarded. These efforts have met with mixed success, perhaps because the first factor provides a more concrete and objective way of determining which cases should actually overcome the presumption. *See, e.g., Pino v. Locascio*, 101 F.3d 235 (2d Cir. 1996) (fact that employees involved in challenged conduct resigned or were fired is not "relief" obtained by the plaintiff that would justify a fee award); *but cf. Wilcox v. City of Reno*, 42 F.3d 550 (9th Cir. 1994) (fact that city voluntarily disciplined police officer involved in incident and revised policies on use of

force justifies fee award, even though plaintiff obtained only nominal damage award).[8]

At bottom, in spite of the Tenth Circuit majority's protests, the plaintiff in this case "accomplished little beyond giving [her] 'the moral satisfaction of knowing that a federal court concluded that [her] rights had been violated' in some unspecified way." *Farrar v. Hobby*, 506 U.S. at 114 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762 (1987)). Indeed, the plaintiff here fails utterly to satisfy the first factor. With respect to the second and third factors, she accomplished nothing to distinguish this case from any other Title VII case in which a plaintiff prevails.

This case was a run of the mill employment dispute, with the plaintiff receiving no judicial relief other than the $1.00 nominal damage award. The jury *rejected* two of plaintiff's three claims. In the end, she was awarded only $1.00 on a *single* claim against a *single* defendant. No injunctive or declaratory relief was awarded. The case relied on settled law; it did not create any new precedent or establish new rights. With all due respect, "[i]f this is not a case in which *Farrar* precludes an award of attorney's fees, [one is] hard pressed to hypothesize one." Pet. App. 11a (Baldock, J., dissenting).

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[8] Some Circuits have awarded fees on inappropriate bases that no Justice of this Court has endorsed. For instance, in one remarkable nominal damages case, the Eighth Circuit awarded an inmate $10,000 in attorney's fees on the ground that the court had appointed the inmate's lawyer, and apparently would have felt guilty if the lawyer did not receive a fee award. *Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994).

CONCLUSION

For the foregoing reasons, the State of Kansas respectfully requests that the Court grant certiorari in this case to resolve the Circuit conflict and to establish the proper analysis for deciding whether and when a statutory fee award is appropriate in cases in which a plaintiff recovers only nominal damages. These issues of law are recurring and important, especially to entities such as States that not infrequently are defendants in civil rights suits.

Respectfully submitted,

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April, 1999

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANN BRANDAU, Plaintiff - Appellee,	
v.	No. 97-3290
STATE OF KANSAS, Defendant - Appellant.	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 96-2414-KHV)

(Filed Feb. 16, 1999)

John R. Dowell, Assistant Attorney General (Carla J. Stovall, Kansas Attorney General, with him on the brief), Topeka, Kansas, for Defendant-Appellant.

Stephen C. Thornberry (Martin M. Meyers with him on the brief), Kansas City, Missouri, for Plaintiff-Appellee.

Before **BALDOCK, McKAY,** and **HENRY,** Circuit Judges.

McKAY, Circuit Judge.

Plaintiff Ann Brandau, a former employee of the State of Kansas, sued the State for hostile work environment and quid pro quo sexual harassment, retaliation, and constructive discharge under Title VII, 42 U.S.C. § 2000e-2(a)(1) to 2000e-17. She worked in the Adult Probation Division for the Twenty-Ninth Judicial District of Wyandotte County, Kansas, and she sought twenty-one months' back-pay and $50,000 in compensatory damages. Plaintiff prevailed on her hostile work environment sexual harassment claim, and the jury awarded her nominal damages of $1.00. The district court then found that Plaintiff was the prevailing party and awarded her attorney's fees and expenses under 42 U.S.C. § 2000e-5(k) in the amount of $41,598.13. Defendant appeals the district court's decision to award attorney's fees and expenses.[1] We exercise jurisdiction under 28 U.S.C. § 1291.

We review an award of attorney's fees for abuse of discretion. *See Berry v. Stevinson Chevrolet*, 74 F.3d 980, 989 (10th Cir. 1996). We will reverse the district court's factual findings only if we have " 'a definite and firm conviction

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[1] It is not clear whether Defendant challenges the analysis underlying the amount of the fee award. After considering several factors including the lodestar amount, "the competent trial presentation and excellent briefing" of Plaintiff's attorneys, and "the reasonable amount of time expended and requested by counsel . . . in preparing and trying the case," the court reduced the lodestar amount by ten percent and awarded Plaintiff $40,398.75 in attorney's fees and $1,199.38 in expenses. Appellant's App. at 82-83. To the extent that Defendant does challenge the amount of the fee award, we believe that the court's analysis was proper. Further, because Defendant apparently did not object to Plaintiff's expenses, *see id.* at 83, we do not review the amount awarded.

that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.' " *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman, Okla.*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)). However, we review de novo the district court's legal analysis underpinning the award. *See Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1231 (10th Cir. 1997).

Plaintiff and Defendant both rely on *Farrar v. Hobby*, 506 U.S. 103 (1992), to support their claims regarding the award of fees and costs. In *Farrar*, the Supreme Court considered the reasonableness of awarding attorney's fees under 42 U.S.C. § 1988 to a party who won only nominal damages in a 42 U.S.C. § 1983 action. *See id.* at 114. The Court denied attorney's fees to a plaintiff who had sought $17 million from six defendants and, after more than a decade of litigation and two appeals, was awarded damages of only $1.00 from one defendant. *See id.* Writing for the majority, Justice Thomas observed that Mr. Farrar's "litigation accomplished little beyond giving [him] 'the moral satisfaction of knowing that a federal court concluded that [his] rights had been violated' in some unspecified way." *Id.* (citation omitted). He concluded that a plaintiff who seeks compensatory damages but achieves such limited success is often the type of prevailing party who "should receive no attorney's fees at all." *Id.* at 115.

Justice O'Connor's concurring opinion in *Farrar* established a three-part analysis "to determine whether a prevailing party achieved enough success to be entitled to an award of attorney's fees." *Phelps v. Hamilton*, 120

F.3d 1126, 1131 (10th Cir. 1997) (adopting Justice O'Connor's framework); *see Farrar*, 506 U.S. at 121-22 (O'Connor, J., concurring). This framework requires the district court to determine the "relevant indicia of success" by examining: (1) the difference between the judgment recovered and the judgment sought; (2) "the significance of the legal issue on which the plaintiff prevailed"; and (3) "the public purpose served" by the litigation. *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring); *see also Phelps*, 120 F.3d at 1131. In light of these considerations, Justice O'Connor concluded that, because Mr. Farrar's case was protracted, demanded $17 million from six defendants, and completely failed to advance any public good, it was "simply not the type of victory that merits an award of attorney's fees." *Farrar*, 506 U.S. at 116 (O'Connor, J., concurring). She therefore agreed with the Court that "the appropriate fee . . . [was] no fee at all." *Id.* at 122 (O'Connor, J., concurring). Nevertheless, as Justice White, joined by three of his colleagues, noted in *Farrar*, the Court did not hold that recovery of nominal damages can never support the award of attorney's fees. *See id.* at 124 (White, J., concurring in part and dissenting in part).

Because Justice O'Connor's framework elaborates on the parameters of a district court's discretion to award attorney's fees to a prevailing plaintiff who recovers only nominal damages, we followed those parameters in *Phelps*. *See Phelps*, 120 F.3d at 1131. Additionally, in accordance with Justice White's observation in *Farrar*, we emphasized that the application of the O'Connor factors did not undermine the general rule that prevailing parties

should recover attorney's fees " 'unless special circumstances would render such an award unjust.' " *Id.* (quoting *Blanchard v. Bergeron*, 489 U.S. 87, 89 n. 1 (1989)).

In this case, the district court applied precisely the analysis we adopted in *Phelps*. Analyzing the degree of success obtained, the first factor under *Farrar*, the court found that, despite Plaintiff's limited monetary recovery, her victory was not merely technical or de minimis; instead, the jury's "verdict vindicated the violation of her civil rights." Appellant's App. at 80. The court determined that the difference between the judgment recovered and the recovery sought was significantly distinct from the corresponding difference in *Farrar:* Plaintiff's claims for damages were not extravagant – she sought only back pay for twenty-one months and $50,000 in non-economic damages – while Mr. Farrar sought damages of $17 million. The court also relied on the fact that, unlike Mr. Farrar's litigation which was drawn out over ten years and two appeals, Plaintiff's litigation was not protracted.[2] Citing this court's decision in *Koopman v. Water District No. 1*, 41 F.3d 1417, 1421 (10th Cir. 1994), the court determined that Plaintiff's nominal damage award did not preclude an award of fees.

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[2] Plaintiff filed her complaint in September 1996 and her amended complaint in February 1997, and the district court's order which is the subject of this appeal was filed in September 1997. An additional factor not expressly relied on by the district court distinguishes this case from *Farrar*: Plaintiff had an enforceable judgment against the sole defendant named in her amended complaint, whereas Mr. Farrar's judgment was enforceable against only one of the six named defendants.

With respect to the second *Farrar* factor, the significance of the legal issue on which the plaintiff prevailed, the district court determined that Plaintiff succeeded on her primary claim, sexual harassment. *See* Appellant's App. at 81. Therefore, although she lost her retaliation and constructive discharge claims, Plaintiff "succeeded on a 'significant issue in litigation which achieves some of the benefit [she] sought in bringing suit.' " *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

Finally, in examining the third factor, the public purpose served by the plaintiff's success, the district court weighed whether "the judgment deters future lawless conduct as opposed to merely 'occupying the time and energy of counsel, court, and client.' " *Id.* (quoting *Phelps*, 120 F.3d at 1132). The court found that Plaintiff presented "evidence that supervisory personnel in [her] department had little training in how to investigate sexual harassment charges, and . . . that, in this case, the department's policy on sexual harassment was not followed." *Id.* at 81-82. Thus, the court found that, "[a]s a result of this case, defendant is on notice that it must educate its employees about sexual harassment in the workplace and must promptly investigate any such claims," and "the present and future employees of both the Wyandotte County Adult Probation Division, and of the State, benefit by having their rights affirmed."[3] *Id.* at 82. In short, the

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[3] The court also noted (in a footnote) that, at an informal meeting between jurors and counsel for both parties immediately following the verdict, "jurors gave the State of Kansas a loud and clear message that it had failed to properly train and educate the chain of command in the Wyandotte County courthouse about how to prevent sexual harassment

court found that while Plaintiff's litigation did not achieve significant monetary benefits, it served a larger public purpose. Although Defendant disputes whether such a benefit in fact occurred and argues that any benefit achieved is speculative, "the [d]istrict [c]ourt was free, within the bounds of the clearly erroneous standard, to find that the lawsuit did benefit" the employees of Kansas and Wyandotte County. *Wilcox v. City of Reno*, 42 F.3d 550, 556 (9th Cir. 1994). Because we do not have " 'a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances,' " *Moothart*, 21 F.3d at 1504 (citation omitted), we do not reverse the district court's factual findings.

Additionally, based on our review of the record and precedent, we do not believe that the district court's legal analysis underlying the award was erroneous. *See Roe*, 124 F.3d at 1231. The court clearly and carefully applied the rule of *Farrar* and Justice O'Connor's three-part analysis which we adopted in *Phelps*. The court also carefully followed our decision in *Koopman* in which we held that the district court erred in denying the plaintiff's motion

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and how to process sexual harassment grievances." Appellant's App. at 82 n.3. We do not believe that this off-the-record conversation between jurors and counsel is definitive or necessary to support the court's factual finding that Plaintiff's litigation served a public purpose. Nonetheless, we note that the court's factual finding that Defendant's failure to instruct the chain of command about sexual harassment prevention and grievance procedures was communicated to the State of Kansas is not clearly erroneous because it is supported by evidence presented by Plaintiff at trial.

for attorney's fees because "the present and future employees of the [Water] District benefit[ted] by having their rights affirmed," even though Mr. Koopman received only a nominal award. *Koopman*, 41 F.3d at 1421. Unlike Mr. Farrar's victory, Mr. Koopman's victory "sen[t] an important message to the [Water] District . . . that it must provide its employees with constitutionally adequate pretermination and post-termination hearings." *Id.* Although the jury's verdict in this case did not order Kansas or Wyandotte County to change its policies, according to *Koopman*, circuit precedent does not require the judgment to order a policy change. *See generally id.* Nor does precedent require the legal victory to be novel to constitute a significant degree of success. *Cf. Roe*, 124 F.3d at 1233 (stating that novelty of issue does not affect availability of fee award); *see also Blum v. Stenson*, 465 U.S. 886, 898-99 (1984) (indicating that novelty of issue should be reflected in lodestar figure).

Instead, *Koopman* instructs us that what is controlling is Plaintiff's vindication of her civil rights and of important rights of her co-workers, even if she sought only a modest amount of damages. *See Koopman*, 41 F.3d at 1421; *see also Farrar*, 506 U.S. at 122 (O'Connor, J., concurring). Plaintiff's victory put Kansas, or at least Wyandotte County, on notice that it should reform its sexual harassment policies and that it is proceeding at its peril if it declines to do so. These results – vindicating rights secured by Title VII and providing a broad constitutional benefit to other employees of Wyandotte County – are in the interests of the public and are exactly what Congress intended to encourage under Title VII. *Cf. Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1081 (10th

Cir. 1998) (holding that a verdict for a plaintiff in a mixed-motive case constitutes a victory on a significant legal issue that serves a public purpose, "notwithstanding the fact that a plaintiff recovers no damages"). Moreover, Defendant pointed to no special circumstances that would render this award unjust. Accordingly, the district court's application of *Farrar* to award attorney's fees in this case adheres to Supreme Court and circuit precedent, enforces Congressional intent, and encourages the vindication of civil rights. "It does not appear to us [that] this is the kind of case *Farrar* was intended to discourage attorneys from taking." *Koopman*, 41 F.3d at 1421.

We conclude that the district court appropriately evaluated the reasonableness of a fee award to Plaintiff in light of controlling case law. We also hold that the court did not abuse its discretion in awarding to Plaintiff $41,598.13 in fees and expenses. The district court's award is AFFIRMED.

No. 97-3290, *Brandau v. State of Kansas*

BALDOCK, Circuit Judge, dissenting.

Because the jury awarded Plaintiff Brandau one dollar on her sexual harassment claim, she is a "prevailing party" entitled to move for an award of attorney's fees against Defendant under 42 U.S.C. § 2000e-5(k). *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). The amount of the jury's damage award does not affect Plaintiff's status as a "prevailing party." Rather, it bears on the reasonableness of

the district court's $40,000 fee award. *Farrar* instructs us that " *'the most critical factor'* in determining the reasonableness of a fee award 'is the degree of success obtained.' " *Id.* at 114 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)) (emphasis added). *Farrar* leaves no doubt as to what normally constitutes a reasonable fee for a party securing only nominal damages where, as here, the recovery of damages was the sole purpose of the litigation:

> In a civil rights suit for damages . . . the award of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury. . . . When a plaintiff recovers only nominal damages because of her failure to prove an essential element of her claim for monetary relief, . . . *the only reasonable fee is usually no fee at all.*

506 U.S. at 115 (emphasis added).

This court's reliance upon "the general rule that prevailing parties should recover attorney's fees," even where that party achieves nothing more than a moral victory through an award of nominal damages, is wrong. *Farrar* says exactly the opposite: Where a jury awards a prevailing party nominal damages and nothing more, an award of attorney's fees is the exception, not the general rule. By discounting *Farrar's* controlling principles, the district court clearly "exceeded the bounds of permissible choice," under the circumstances of this case. Because this court's opinion, like the district court's, is contrary to *Farrar*, I dissent.[1]

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[1] In *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1078 (10th Cir. 1998), we incorrectly referred to *Farrar* as a

Relying on Justice O'Connor's concurring opinion in *Farrar*, 506 U.S. at 116-22 (O'Connor, J., concurring), which notably no other member of the Court chose to join, this court makes much about the district court's conclusions that the jury's verdict "vindicated the violation of [Plaintiff's] civil rights," and "served a larger public purpose." Such vague and indeterminate postulations may be made in virtually all civil rights litigation where plaintiff is a prevailing party by virtue of a nominal damage award. The proper analysis in this case, however, even under Justice O'Connor's approach, is straightforward: The ratio between the damages sought and recovered was 50,000 to 1; the sole legal issue on which Plaintiff prevailed was unremarkable; and the public benefit from the litigation was uncertain at best, negligible at worst. *See id.* at 121-22 (O'Connor, J., concurring). If this is not a case in which *Farrar* precludes an award of attorney's fees, I am hard pressed to hypothesize one.

As the second circuit has noted: "The vast majority of civil rights litigation does not result in ground-breaking conclusions of law, and therefore will only be appropriate candidates for fee awards if a plaintiff recovers some significant measure of damages or other meaningful relief." *Pino v. Locascio*, 101 F.3d 235, 239 (2d Cir. 1996). "[N]ot every tangential ramification of civil rights litigation ipso facto confers a benefit on society." *Id.* Yet after today, the general rule in the Tenth Circuit appears to be

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plurality opinion. Justice Thomas' opinion was joined by four other justices, (including Justice O'Connor who also wrote separately), making it the opinion of the Supreme Court, and thus binding upon this court.

that a one dollar nominal damage award alone justifies a $40,000 fee award.

Any tangible benefit which might justify the district court's fee award is "utterly lacking" in this case. *See Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1995). Plaintiff obtained no meaningful relief – damage award or otherwise. Thus, this court's opinion finds little support in decisions like *Case v. Unified School Dist. No. 233*, 157 F.3d 1243 (10th Cir. 1998), and *Phelps v. Hamilton*, 120 F.3d 1126 (10th Cir. 1997), where plaintiffs were successful in obtaining prospective relief – a very tangible benefit. The analysis the court undertook in those cases is simply inappropriate for cases such as this where a civil rights plaintiff achieves little or nothing. Moreover, although the district court reasoned that the evidence showed Defendant's response to sexual harassment in the workplace was inadequate, the fact remains that the "enforceable judgment" requires Defendant to do nothing more than pay Plaintiff $1.00. As Justice O'Connor noted in *Farrar*: "Chimerical accomplishments are simply not the kind of legal change that Congress sought to promote in the fee statute." 506 U.S. at 119 (O'Connor, J., concurring).

The issue in this case is straightforward and before today easily resolved: Does a district court abuse its discretion in awarding attorney's fees to a civil rights plaintiff who recovers only nominal damages and nothing more? In *Farrar*, the Supreme Court answered the question with a resounding yes. As an inferior federal court, we must follow its dictates. While *Farrar* did not establish a *per se* rule that a civil rights plaintiff recovering only nominal damages can never receive an attorney's fee award, the Court's opinion clearly indicates that

a fee award in such a case will be rare. *See Pino*, 101 F.3d at 238. Plaintiff Brandau's lawsuit is not the rare exception. Because we are bound by *Farrar*, I would hold that the district court abused its discretion, and reverse its award of attorney's fees.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ANN BRANDAU, Plaintiff,	)	Civil Action
v.	)	No. 96-2414-KHV
STATE OF KANSAS, Defendant.	)	

MEMORANDUM AND ORDER

(Filed Sep. 9, 1997)

On July 3, 1997, the jury returned a verdict in favor of Ann Brandau, awarding $1.00 actual damages on her Title VII sexual harassment claim against the State of Kansas.[1] This matter is before the Court on *Plaintiff's Motion For Award Of Attorneys Fees* (Doc. #84) filed July 17, 1997, pursuant to 42 U.S.C. § 2000e-5(k), Fed. R. Civ. P. 54(d)(2) and D. Kan. Rule 54.2. Defendant argues that plaintiff is not entitled to any fee award, because of her limited monetary success, but does not specifically question any of the fees or expenses which she incurred in obtaining that relief – however limited. The Court, in its discretion, finds that plaintiff is a prevailing party who is entitled to fees and expenses and finds that she reasonably incurred fees and expenses of $41,598.13 in that regard.

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[1] The jury returned a defense verdict on plaintiff's retaliation and constructive discharge claims under Title VII.

Analysis

Pursuant to 42 U.S.C. § 2000e-5(k), "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." In this case, plaintiff prevailed on only one of three claims against defendant, and recovered only nominal damages. A plaintiff who wins nominal damages, however, is a prevailing party for the purpose of awarding attorney fees. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (considering fees under 42 U.S.C. § 1988).[2] A prevailing party " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *See Phelps v. Hamilton*, ___ F.3d ___, 1997 WL 458062 at *4 (10th Cir. Aug. 12, 1997) (quoting *Blanchard v. Bergeron*, 489 U.S 87, 89 at n.1 (1989)). Thus the relevant inquiry is what constitutes a reasonable fee.

A court will generally determine what fee is reasonable by calculating the lodestar – the total number of hours reasonably expended, multiplied by a reasonable hourly rate – and then adjusting the lodestar upward or downward to account for the particularities of the suit and its outcome. *See Phelps*, ___ F.3d ___, 1997 WL 458062 at *4 (citing *Hensley*, 461 U.S. at 433-34). In cases where the result is merely technical or de minimis, however, a court may award low fees or no fees, without calculating a lodestar. *Id.* (citing *Farrar*, 506 U.S at 115).

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[2] Cases awarding fees under Section 1988 are applicable to fee awards under Title VII, as both provide for "prevailing party" fee awards. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 at n.7 (1983).

In analyzing whether plaintiff's victory is purely technical or de minimis, the Court looks to the three "relevant indicia of success" set forth in Justice O'Connor's concurring opinion in *Farrar*: (1) the difference between the judgment recovered and the recovery sought; (2) the significance of the legal issue on which plaintiff prevailed; and (3) the public purpose of the litigation. *Id.* at *5 (citing *Farrar*, 506 U.S. at 121-22) (O'Connor, J., concurring).

The first and most critical factor in determining the reasonableness of a fee award, however, is the degree of success obtained. *Id.* (citing *Farrar*, 506 U.S. at 114). Notwithstanding plaintiff's limited monetary recovery, the verdict vindicated the violation of her civil rights. Moreover, the damages which plaintiff sought are distinguishable from those in *Farrar*, where the plaintiff sought $17 million in damages from six defendants. After ten years of litigation and two trips to the court of appeals, plaintiff in *Farrar* received only $1 from one defendant. *Farrar*, 506 U.S at 107-08. In this case, plaintiff sought backpay damages for 21 months. Plaintiff also suggested that the jury award $50,000 in noneconomic damages. Plaintiff did not seek front pay or punitive damages. Unlike the litigation in *Farrar*, this litigation was not protracted, nor were plaintiff's claims for damages extravagant. Accordingly, the Court finds that while plaintiff is not entitled to full reimbursement for her attorneys' fees and costs, the nominal damage award does not preclude an award of fees in this case. *See Koopman v. Water Dist. No. 1*, 41 F.3d 1417, 1421 (10th Cir. 1994) (plaintiff recovering $1 not entitled to full reimbursement for attorney's fees and costs).

The second factor in the *Farrar* analysis goes beyond the actual relief awarded to examine the extent to which the plaintiff succeeded on her theory of liability. *See Phelps*, ___ F.3d ___, 1997 WL 458062 at *5 (citing *Farrar*, 506 U.S. at 578-79) (O'Connor, J., concurring). Despite losing on her retaliation and constructive discharge claims, plaintiff succeeded on her main theory, sexual harassment. She has thus succeeded on a "significant issue in litigation which achieves some of the benefit [she] sought in bringing suit." *See Hensley*, 461 U.S. at 433.

Finally, the Court considers the public purpose served by plaintiff's success. *Phelps*, ___ F.3d ___, 1997 WL 458062 at *6 (citing *Farrar*, 506 U.S. at 578-79) (O'Connor, J., concurring). This factor examines whether the judgment deters future lawless conduct as opposed to merely " 'occupying the time and energy of counsel, court, and client.' " *Id.* (citing *Farrar*, 506 U.S. at 578) (O'Connor, J., concurring). Plaintiff worked for the State of Kansas in the Adult Probation Division for the 29th Judicial District of Wyandotte County, Kansas. At trial, plaintiff produced evidence that supervisory personnel in this department had little training in how to investigate sexual harassment charges, and also produced evidence that, in this case, the department's policy on sexual harassment was not followed. As a result of this case, defendant is on notice that it must educate its employees about sexual harassment in the workplace and must promptly investigate any such claims.[3] Although it is true that plaintiff

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[3] Immediately after the jury returned its verdict, jurors agreed to meet informally with counsel for both parties. During that session, jurors gave the State of Kansas a loud and clear

received only a nominal monetary award, the present and future employees of both the Wyandotte County Adult Probation Division, and of the State, benefit by having their rights affirmed. Based upon this analysis of the *Farrar* factors, the Court finds that plaintiff's success was not merely technical or de minimus.

Plaintiff asks the Court to award the following time and hourly rates for counsel: (1) Martin M. Meyers, 87.75 hours at $150 per hour; (2) Stephen C. Thornberry, 306 hours at $100 per hour; and (3) Jeffrey A. Dehon, 7.50 hours at $150 per hour. At these rates, plaintiff respectively seeks $13,162.50, $30,600 and $1,125 for counsels' time, totaling $44,887.50. These figures include hours necessarily spent post-trial on the fee application, which is also compensable. *See Ellis v. University of Kan. Med. Ctr.*, 1996 WL 570187 at *5 (D. Kan. 1996) (citing *Bratcher v. Bray-Doyle Indep. Sch. Dist.*, 8 F.3d 722, 726 (10th Cir. 1993)).

Had plaintiff recovered more than nominal damages, the Court would award the lodestar amount. The amount of time spent on this case is in line, if not less than, what any reasonable attorney in the community would spend on this matter. Moreover, the Court commends trial counsel – Mr. Meyers and, in particular, Mr. Thornberry – on their competent trial presentation and excellent briefing throughout the case. Plaintiff herself recognizes, however, that a reduction in the lodestar amount is appropriate

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message that it had failed to properly train and educate the chain of command in the Wyandotte county courthouse about how to prevent sexual harassment and how to process sexual harassment grievances.

due to the limited monetary success achieved. Plaintiff suggests that a reduction of 10 to 15 percent is appropriate. Absent any suggestion by defendant, the Court finds that a 10 percent reduction is appropriate. *See e.g., Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Sup. 1432, 1447 (D. Kan. 1987) (reducing fees by 10 percent where plaintiff received no award of damages). In limiting the reduction to this percentage, the Court is strongly influenced by both the reasonable amount of time expended and requested by counsel and the efficient use of Mr. Thornberry, a second year associated, in preparing and trying the case. The Court therefore finds that plaintiff should be awarded $40,398.75 (44,887.50 less 4,488.75) to reflect a 10 percent reduction in the total amount of hourly fees requested.

In addition to these hourly fees, plaintiff seeks $1,199.38 for certain costs incurred in this litigation. There are two types of "costs" or "expenses" properly reimbursable to a prevailing party in Title VII litigation – those that are suitably characterized as fees pursuant to a fee shifting statute and those which are governed by 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d). *See Bee v. Greaves*, 910 F.2d 686, 690 (10th Cir. 1990).

> While only those items listed under Section 1920 may be awarded as costs, other out-of-pocket expenses incurred during litigation may be awarded as attorneys fees . . . if (1) the expenses are not absorbed as part of law firm overhead but are normally billed to a private client, and (2) the expenses are reasonable.

Jane L. Bangerter, 61 F.3d 1501, 1517 (10th Cir. 1995) (rev'd & remanded on other grounds). The Court finds that

plaintiff's itemized expenses meet the above criteria and, as defendant raises no objection, the Court finds that expenses in the amount of $1,199.38 should be allowed.

IT IS THEREFORE ORDERED that *Plaintiff's Motion For Award Of Attorneys Fees* (Doc. #84) filed July 17, 1997, should be and hereby is sustained, as modified. The Clerk is directed to enter judgment against defendant in the amount of $41,598.13.

Dated this 9th day of September, 1997, at Kansas City, Kansas.

/s/ Kathryn H. Vratil
KATHRYN H. VRATIL
UNITED STATES DISTRICT JUDGE